United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

403

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 24513.

PFC. SAMUEL G. GREEN, JR. 254-82-27 USMC,
Appellant,

vs.

MELVIN LAIRD, SECRETARY OF DEFENSE, *et al.*,
Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

BEN PAUL NOBLE,
THOMAS O. MANN,
2022 R Street, N.W.,
Washington, D. C. 20009,
Attorneys for Appellant.

Of Counsel:
JAMES A. CHIARA,
1914 Superior Building,
Cleveland, Ohio 44114.

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BRIEF FOR APPELLANT.

STATEMENT OF QUESTIONS PRESENTED.

The question is whether an action for Declaratory Judgment under Title 28, Section 2201 U.S.C., is beyond the purview and provisions of the Uniform Code of Military Justice and if the lower courts' summary dismissal of the Complaint and refusal to hear the case on its merits is,

(a) erroneous in that it deprives the Appellant of his day in court, due process of law and the equal protection of law violative of his rights under the Constitution of the United States;

(b) erroneous in that he performed his duty as he was trained to do in accordance with the policy and orders of his superior and commanding officers;

(c) erroneous in that he was trained to regard the alleged non-combatant civilians involved as the enemy, who were to be "sought out and destroyed";

(d) erroneous in that his presence in the area, including his intent, purpose, means and motive were

provided for and supplied by his superior and commanding officers who transported him to South Vietnam without any independent participation on his part, save and except for his enlistment in the Marine Corps and his resulting obligation under oath, to perform and carry out their orders under peril of severe penalties and punishment for failure to do so;

(e) erroneous in that his superior and commanding officers as the directors, controllers, supervisors and instigators of the battle operation were conclusive accessories to, and primarily responsible for the resulting incident, none of which would have occurred without their premeditated participation therein;

(f) erroneous in that the premeditated participation in the battle maneuver by his superior and commanding officers as accessories, by reason of their planning, supervision, direction, controlling and ordering the patrol into the "free fire zone," and as well supplying the means and weapons for destruction of human life, deprives them of jurisdiction over the Appellant for the purpose of convening a General Court-Martial as a result of their active participation and being parties in interest responsible for the incident;

(g) erroneous in that the active participation of the Defendants as accessories to the incident constitutes a Justiciable Controversy requiring a legal determination by an independent judicial forum of the rights of the parties not provided for under either the Uniform Code of Military Justice or procedures within the Jurisdiction of the Military Court of Appeals.

This case has not been before this court previously.

References to Rulings:

Appeal is from an order entered on July 22, 1970, denying appellant's motion for rehearing on the order entered July 9, 1970, dismissing the complaint.

STATEMENT OF THE CASE.

JURISDICTIONAL STATEMENT.

The jurisdiction of the Court below was founded upon the "Declaratory Judgment Act," 28 U.S.C.A. 2201 and the Federal Rules of Civil Procedure, Rule 57.

The jurisdiction of this Court is invoked pursuant to the same Act, same section, and pursuant to the Act of October 31, 1951, amending the Judicial Code, 665, 65 Stat. 726, 28 U.S.C.A. 1291, the Federal Rules of Appellate Procedure, Rule 3 (a) 4 (a).

On June 4, 1970, Appellant filed his "Complaint for Declaratory Judgment" in the United States District Court for the District of Columbia, seeking Declaratory relief from criminal responsibility in connection with the results of a battle procedure carried out in obedience to the directives of his superior officers in the course of the United States Government's participation in the Vietnamese War.

In conjunction therewith a motion was filed for Injunctive Relief and a Temporary Restraining Order requesting that the General Court-Martial proceedings be stayed pending a final determination in the action for Declaratory Judgment.

Following this, Plaintiff filed a motion for Order Requiring and Directing the Filing and Turnover of the Official Transcript prepared under Article 32 of the Uniform Code of Military Justice.

Appellees filed a motion to dismiss Appellant's Complaint and opposed the motion for Temporary Restraining Order and Preliminary Injunction. In addition, Defendants filed a motion for Protective Order and Opposition to Plaintiff's Motion for Order Requiring and Directing the Filing and Turnover of the Official Transcript.

Hearing was had on the 8th day of July, 1970. On the 9th day of July, 1970, the lower court summarily dismissed Appellant's Complaint; overruled the motion for Preliminary Injunctive Relief; overruled the motion for Order Requiring and Directing the Filing and Turnover of the Official Transcript and rendered judgment accordingly.

Thereafter, Appellant filed a motion for Reconsideration and Rehearing together with a motion for the Designation of a three Judge District Court, and another motion for Temporary Restraining Order, all of which were duly overruled on July 22, 1970. Order rendered accordingly.

This appeal was taken from that order by "Notice of Appeal" filed July 27, 1970, and the time for filing this Brief was extended to October 25, 1970, by order of this Court.

STATEMENT OF FACTS.

Appellant at the age of 18 years, enlisted in the United States Marine Corps at Cleveland, Ohio, during the month of August, 1969. After a basic training period of approximately five months, he was shipped to South Vietnam during the month of January, 1970, and duly assigned to a combat unit. After approximately two weeks in the field, he was requested to volunteer for service on a night patrol officially classified as a "Killer Team." Purpose of the "Killer Team" mission was to enter enemy territory in a specifically designated "free fire zone" and "seek out and destroy enemy and hostile personnel." In accordance with the directives and commands of his superior officers the patrol consisting of five men under the leadership of a corporal, proceeded to the specified battle area and commenced operations. During the course thereof, the patrol

encountered habitants in the designated "free fire zone" which supposedly was militarily unauthorized for occupancy. As a result of the encounter in this "free fire zone," certain alleged non-combatants were killed.

Thereafter, following an investigation, Appellant among others, was charged with the crime of unpremeditated murder under the Uniform Code of Military Justice. In accordance therewith, his commanding officer as the Convening Authority referred the matter to a General Court-Martial proceeding.

STATUTES AND RULES INVOLVED.

The Declaratory Judgment Act, 28 U.S.C.A. 2201:

§ 2201. Creation of Remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, § 111, 63 Stat. 105.

Federal Rules of Civil Procedure, Rule 57:

DECLARATORY JUDGMENTS.

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C.A., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The

Court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar. As amended December 29, 1948, effective October 20, 1949.

STATEMENT OF POINTS.

1. An action for Declaratory Judgment under Title 28, Section 2201 United States Code is beyond the purview and provisions of the Uniform Code of Military Justice.

2. The Appellant may not be prosecuted by a General Court-Martial under the Uniform Code of Military Justice for performing and carrying out prescribed military duties in accordance with his specific orders, training and instructions he received as a member of the United States Marine Corps.

3. The Appellant is entitled to a full hearing on the merits of his Complaint for Declaratory Judgment thereby enabling the Court to ascertain and find the facts of the case in order to determine the legal consequences thereof.

4. The Appellees as motivators, directors and controllers of a specific battle mission may not disclaim responsibility as accessories to the fact in a battle maneuver resulting in a blunder for lack of reasonable judgment and foresight.

5. The Appellees as directors, supervisors, motivators and active participants in a battle maneuver resulting in the killing of alleged non-combatant civilians, may not as parties in interest responsible for the incident, retain jurisdiction over the Appellant for General Court-Martial proceedings in a matter to which they were accessory.

6. The Justiciable Controversy as of and between the parties herein arises from the unconstitutional and unlaw-

ful application of the provisions of the Uniform Code of Military Justice and General Military Law to the Appellant under the facts and circumstances as developed in this case. (United States Code Sections 101 to 940 inclusive) (Article 1 to 140 inclusive UCMJ.)

ARGUMENT.

For the purpose of this Brief, Appellant will be referred to as Plaintiff and Appellees as Defendants.

Plaintiff submits that his commanding officers and the Convening Authority as represented by the Defendants, were accessories to the killing of alleged non-combatant civilians during the course of the war in South Vietnam thereby divesting them of jurisdiction and prohibiting the prosecution of the Plaintiff under a General Court-Martial proceeding in accordance with the provisions of the General Military Law and the Uniform Code of Military Justice.

To hold otherwise, results in gross inequity to the Plaintiff depriving him of his day in court, due process of law and the equal protection of the law under the Constitution of the United States. (Sec. 1 Fourteenth Amend. and Fifth Amend. U. S. Const.)

For the purpose of a determination of his legal rights Plaintiff brought this action under the Declaratory Judgment Act, Title 28 Section 2201 United States Code. However, the lower court in summarily dismissing his Complaint without a hearing on the merits, has prevented him from presenting the essential facts of the existing "Justiciable Controversy" from which the Court could ascertain the legal consequences.

Again in this instance, Plaintiff is denied the constitutional right of his day in court, due process of law

and the equal protection of the law. (Sec. 1 Fourteenth Amend. and Fifth Amend. U. S. Const.)

In the Complaint Plaintiff named as Defendants, Melvin Laird, Secretary of Defense, John H. Chafee, Secretary of the Navy, General Leonard Chapman, Jr., Commandant United States Marine Corps, and all other officers in the department subservient to the chain of command down to and including Plaintiff's platoon commander.

However, with the exception of the Defendants, Secretary Laird, Secretary Chafee, and General Chapman, the remaining Defendants could not be served due to their assigned stations beyond the continental limits of the United States.

Plaintiff in bringing this action for Declaratory Judgment does not attempt to substitute the jurisdiction of the Federal District Court for the Military Tribunal as constituted and provided for by the Uniform Code of Military Justice. Nor, is it his intention to circumvent its functions. Plaintiff's only reason for resorting to the procedure under the Declaratory Judgment Act is that no similar or otherwise adequate remedy is available under the Uniform Code of Military Justice; or for that matter in that the Uniform Code of Military Justice includes the Defendants as "persons coming within or under the provisions of the Act" as accessories. This despite their official capacity as superior officers and the Convening Authority. Furthermore, the Justiciable Controversy requiring a declaration of Plaintiff's constitutional rights under the Declaratory Judgment Act (Title 28 Section 2201) results from the conflicting and repugnant application of specific statutory provisions of the General Military Law and the Uniform Code of Military Justice.

Title 10 of the United States Code, Sections 1 to 3000, relates to the Armed Forces, the General Military Law and the Uniform Code of Military Justice.

The pertinent provisions are fully or partially quoted following on the basis of their applicability to the case at bar:

Title 10, Section 101 Definitions:

> "(4) 'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.
>
> (5) 'Department,' when used with respect to a military department, means the executive part of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, it means the executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments."

Title 10, Section 141 Composition and Functions:

> "(a) There are in the Department of Defense the Joint Chiefs of Staff consisting of—
>
> 1. a Chairman, who has no vote;
> 2. the Chief of Staff of the Army;
> 3. the Chief of Naval Operations; and
> 4. the Chief of Staff of the Air Force.
>
> (b) The Joint Chiefs of Staff are the principal military advisers to the President, the National Security and the Secretary of Defense.

(c) The Commandant of the Marine Corps shall indicate to the Chairman any matter scheduled for consideration by the Joint Chiefs that directly concerns the Marine Corps. Unless, upon request of the Chairman for a determination, the Secretary of Defense determines that such a matter does not concern the Marine Corps, the Commandant shall meet with the Joint Chiefs of Staff when that matter is under consideration. While the matter is under consideration and with respect to it, the Commandant has coequal status with the members of the Joint Chiefs of Staff."

(d) Subject to the authority and direction of the President and the Secretary of Defense, the Joint Chiefs of Staff shall—

(1) prepare strategic plans and provide for the strategic direction of the armed forces;

Title 10, Section 171 Armed forces policy council

"(a) There is in the Department of Defense an Armed Forces Policy Council consisting of—

(1) the Secretary of Defense, as Chairman, with the power of decision;

(2) the Secretary of the Navy."

Title 10, Section 802 (Article 2 UCMJ)

Persons subject to this chapter

"(1) Members of a regular component of the Armed Forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it."

Title 10, Section 877 (Article 77 UCMJ) Principals

"Any person punishable under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this chapter;

is a principal."

Title 10, Section 822 (Article 22 UCMJ)

Who may convene general courts-martial

"(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary concerned;

(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps."

Title 10, Section 890 (Article 90 UCMJ)

Assaulting or willfully disobeying superior commissioned officer

"Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

Title 10, Section 892 (Article 92 UCMJ)

Failure to obey order or regulation

"Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct."

The foregoing covers the general organization, disciplinary powers, functions and composition of the military establishment. The resultant authority and delegable power in the chain of command of which this Court must take judicial notice is readily apparent. Furthermore, the Defendants actually served in this instance are parties sufficient for this action as principals and controlling representatives of Plaintiff's superior officers and Convening Authority. Therefore, all reference to Defendants in this Brief is to the Convening Authority and Plaintiff's Commanding Officers as a single unit.

Based on the statutory provisions quoted, it must be conceded that the South Vietnam War is under the exclusive direction and control of the Defendants; subject however, to their individual official capacity in the military establishment. On the other hand, the Plaintiff is merely the means of Defendants' accomplishment in the battle operation. He is under penal obligation to obey and carry out the Defendants' orders.

Referring to Article 77 UCMJ, Title 10, Section 877 United States Code; Article 90 UCMJ, Title 10, Section 890 United States Code, and Article 92 UCMJ, Title 10,

Section 892 United States Code, it is impossible to justify the charge of Unpremeditated Murder brought against this Plaintiff without involving the Defendants with full responsibility for the incident.

The Justiciable Controversy is that the Defendants were accessories and participants to the killing of the alleged non-combatant civilians, requiring a determination of the legal rights of the parties by a full and complete ascertainment of the facts.

The Defendants as accessories, may not act in the dual capacity of judge and prosecutor which would be contrary to the provisions of the Uniform Code of Military Justice; and as accessories to the incident, they are also deprived of jurisdiction over the Plaintiff.

It is beyond comprehension and inconceivable that the protective provisions of the United States Constitution will permit this inequitable application of the law, lacking in every aspect of fundamental fairness to go unchallenged.

For convenient reference, the Declaratory Judgment Act, Title 28, Section 2201, United States Code, is quoted at length following:

§ 2201. Creation of remedy.

> "In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Its provisions are clear, concise and lacking of any limitation as to who may or may not avail themselves of this remedy. Consequently, to hold that a citizen of the

United States while a member of the Armed Forces is precluded from bringing this action by reason of the Uniform Code of Military Justice, is erroneous. Particularly so, when the subject matter of the relief sought is not provided for in the Uniform Code of Military Justice.

On the basis of the "Statement of Facts," on which there can be no disagreement, it must be conceded that the circumstances of this incident were unique.

> **Note:** The ultimate facts in Plaintiff's Complaint were developed from the certified official transcript (over a thousand pages including exhibits) of the Investigative Procedure under Article 32 of the Uniform Code of Military Justice. At the hearing before the lower court, July 8, 1970, it was marked for purposes of identification as Plaintiff's Exhibit 1 and offered into evidence. No ruling on this point either affirmatively or otherwise was made. However, it stands proffered as such for the purposes of the record.

The killing of alleged non-combatant civilians occurred in an established pre-designated "free fire zone" during the course of a night patrol carried out by a "Killer Team." The mission was to "seek out and destroy any enemy personnel" in obedience to Defendants' specific orders.

Therefore, it is essential that Plaintiff be given the opportunity of presenting factual evidence in support of his position. That he be given his day in court which will establish that the Defendants under the facts and circumstances, were accessories to the killing of alleged non-combatant civilians; and as well parties and participants; that as a result are thereby divested of jurisdiction over the Plaintiff in a General Court-Martial proceeding under the provisions of the Uniform Code of Military Justice.

Factual controversies from which legal consequences may develop are the proper subject of a Declaratory Judgment. This rule of law necessarily controls, regardless of the subject matter.

In *Aetna Life Insurance vs. Haworth,* 300 U.S. 227 (March 1937) Chief Justice Hughes comments on the pertinence of factual circumstances to a legal determination.

This case involved a claim for benefits under a contract of insurance. The controversy arose from a question of fact concerning a lapse in the policy for failure to pay premiums. Or in the alternative, a non-requirement of premium payments during a period of the insured's disability.

The Justiciable Controversy revolved around the factual circumstances of disability.

On page 242 of Aetna, Justice Hughes asserts that "Legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences."

It is submitted that this rule is general in its application. That it is pertinent to the circumstances in the case at bar. That only after an ascertainment of the facts in this case, can the court possibly determine the legal consequences in respect to whether the Defendants were accessories to this killing of alleged non-combatant civilians with the result that they should be divested of jurisdiction over the Plaintiff in the General Court-Martial proceedings.

Under these circumstances, the lower court was hasty and premature in summarily dismissing Plaintiff's action at the hearing on July 8, 1970.

In support of the contention that Defendants were

accessories to the killing of alleged non-combatant civilians, Plaintiff submits the following.

Generally when persons combine to accomplish a given purpose, each and all are responsible for everything that is done incidental to the common design as one of its probable and natural consequences even though what was done was not intended as part of the original design or common plan. This holds true, even though some of the persons making up the combine are not present when the act is committed.

In the case at bar, Plaintiff as a member of the Armed Forces in the United States Marine Corps, was ordered upon volunteering to participate in a battle maneuver as a member of a "Killer Team" to operate in a specifically designated "free fire zone" and to "seek out and destroy any enemy personnel." During the course of this mission, certain alleged non-combatant civilians were killed.

Whether this was a blunder due to the inexperience of the members of the "Killer Team" or to stupidity and poor judgment on the part of the Defendants in ordering the patrol out under the existing conditions, can only be ascertained by a full determination of the facts. In any event, there can be no question of Defendants' position as accessories to the fact as well as participating in the incident from start to finish. Nor can they disclaim responsibility as the sponsors, controllers and organizers of the operation.

In the light of these circumstances, which could only be developed and ascertained by the facts, the Uniform Code of Military Justice would not control nor would it have any application.

In this instance Defendants as accessories have no status for the purpose of convening and conducting a General Court-Martial. If a crime was committed, then

the responsibility lies with both the Plaintiff and Defendants, who would be subject to prosecution by an independent judicial forum or an entity beyond the provisions of the Uniform Code of Military Justice.

In example, reference is made to the Nurenburg trial procedures conducted after the II World War. Clearly if a crime was committed, it was one against humanity and not within the purview of the Uniform Code of Military Justice as enacted.

In an early case, *Boyd vs. United States*, 142 U.S. 450 (January 4, 1892), the law controlling accessories is discussed.

In this case the Supreme Court fully approves a charge on the law by the Trial Court on the subject of accessories.

This case concerned the crime of murder in the course of an attempted robbery of a river ferryman in Indian country in the State of Arkansas. During the trial the question of participation and responsibility regarding the other men involved as accessories was brought out for consideration. At the conclusion of the case the trial court charged on the law of accessories.

The pertinency and general application of the rule as approved and contained in the first portion of the charge, is so pertinent to the case at bar that it will be quoted at length following:

(Page 455)

> The rule upon this subject was thus expressed by the court in its charge to the jury: "If a number of men agree to do an act which, from its nature or the way it is to be done, is an act that will put human life in jeopardy, then the putting of human life in jeopardy, or the destruction of human life, is a necessary and a natural and probable consequence of the

act agreed to be done by the party, and upon the principle of the law I have already announced to you, it is but equal and exact justice that all who enter upon an enterprise of that kind should be responsible for the death of an innocent person that transpires because of the execution of the enterprise then entered upon, and because that enterprise is one that would naturally and reasonably produce that result."

True, this case pertains to the crime of robbery. Nevertheless, its instructive provisions must apply in any instance where the law governing accessories is concerned. The introductory portion of this charge unequivocally applies to persons acting in concert to accomplish a given purpose and must of necessity also apply to persons engaged in a war.

On the face of the record in the case at bar, there can be no question that the Plaintiff and the Defendants were acting in concert to accomplish a given purpose prescribed in the maneuver known as a "Killer Team" on a "seek and destroy mission."

A comparative analogy to the case at bar on the statement of law contained in the charge, is submitted following:

1. The Defendants in concert with the Plaintiff and other members of the "Killer Team," planned the mission of a night patrol to enter a "free fire zone" and "seek out and destroy enemy personnel."

2. The very nature of the general purpose and intentions of the Defendants and members of the "Killer Team" which included Plaintiff as a member of the United States Marine Corps were to put human life in jeopardy and/or its destruction in accordance with specific orders from the Defendants.

3. That the destruction of human life was the necessary, natural and probable consequence of the function of the "Killer Team" as organized and di-

rected by the Defendants in the conduct of the battle operation.

4. That it is but equal and exact justice that all who enter upon an enterprise such as carrying on the war operation in South Vietnam, should be responsible for the death of innocent persons that results because of the execution of the enterprise such as directing a "Killer Team" on a night patrol into a "free fire zone" on a "search and destroy mission" and because the enterprise was one that would naturally and reasonably produce that result.

It must be conceded that the foregoing as re-phrased in related comparison to the statement of law contained in *Boyd,* appeals to sound logic legal reasoning and is pertinent and controlling in the case at bar.

The facts alleged in this case as asserted in Plaintiff's Complaint, none of which have been denied by Answer or other pleading, would clearly support the foregoing charge involving Defendants as accessories and active participants to the alleged incident.

CONCLUSION.

Whether Plaintiff would or would not prevail as against the Defendants in this case, is of secondary importance. What is important is a legal determination of the Justiciable Controversy involving the Defendants as accessories; a determination after a full ascertainment of the facts of the legal consequences of the Defendants' participation as accessories in the incident which would obviate the application of the Uniform Code of Military Justice.

To refuse Plaintiff an opportunity to be heard and to deprive him of his day in court, due process of law and the equal protection of the law under the Constitution of the United States, would constitute gross inequity to say

nothing of the unjust and flagrant deprivation of his constitutional rights.

Finally, it is submitted that despite the fact that the court-martial has taken place and Plaintiff has been found guilty and sentenced to a dishonorable discharge and five (5) years at hard labor, the question presented by this appeal is not moot. In accordance with legal jurisprudence as adhered to in the United States, a question of jurisdiction is continuous and will be given consideration at any stage of the proceedings. Consequently, if Plaintiff should prevail in the Declaratory Judgment with the result that the Convening Authority under the Uniform Code of Military Justice was without jurisdiction, then the General Court-Martial proceedings as a result, would become a nullity.

Respectfully submitted,

BEN PAUL NOBLE,
THOMAS O. MANN,
2022 R Street, N.W.,
Washington, D. C. 20009,
Attorneys for Appellant.

Of Counsel:

JAMES A. CHIARA,
1914 Superior Building,
Cleveland, Ohio 44114.

No. 24,513

IN THE UNITED STATES COURT OF APPEALS
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PFC. SAMUEL G. GREEN, JR.
254-62-27, USMC,

Appellant,

v.

MELVIN LAIRD, SECRETARY OF DEFENSE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLEES

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ROBERT V. ZENER,
DONALD L. GORDON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

CITATIONS

Cases:

IN THE UNITED STATES COURT OF APPEALS
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No. 24,513

PFC. SAMUEL G. GREEN, JR.
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLEES

QUESTIONS PRESENTED*

1. Whether appellant's court-martial conviction renders moot his action to enjoin the court-martial.

2. Whether the civil courts have jurisdiction to enjoin court martial proceedings or to enter declaratory judgments absolving defendants in those proceedings from military crimes with which they are charged under the Uniform Code of Military Justice.

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*This case has previously been before this Court. On August 11, 1970, this Court denied appellant's motion for a temporary restraining order and injunctive relief and for immediate hearing. For the convenience of the Court, that order is reproduced infra, at p. 1a.

COUNTERSTATEMENT OF THE CASE

Appellant, Pfc. Samuel G. Green, Jr., was charged under military law with the murder of sixteen Vietnamese civilians (all women and children) while on a combat mission. He was informed of the charges on March 14, 1970. On June 8, 1970, appellant began this suit for declaratory and injunctive relief. The court-martial was originally scheduled to commence on June 22, 1970. In deference to the civilian courts, the military proceedings were continued. On July 9, the district court denied relief, and the court-martial was rescheduled for July 20. On July 17, appellant filed a petition for a writ of prohibition in the Court of Military Appeals. That petition was denied on July 23, 1970. Green v. Convening Authority, 19 U.S.C.M.A. 576, 42 C.M.R. 178 (1970), reprinted infra at pp. 2a-6a. In the interim, however, appellant also filed suit for an injunction in the District Court for the Northern District of Ohio, which denied relief on July 22, 1970. Green v. Chapman, Civ. Action No. 070-695 (N.D. Ohio). That oral opinion is reprinted infra, at pp. 7a-22a . No appeal was taken from the Ohio district court order. Meanwhile, the court-martial had been continued indefinitely. Since the trial was to be held in Vietnam, rather elaborate preparations were necessary -- for example, armed patrols had to be sent out to transport witnesses from the combat area to the proceedings -- and this continuance marked the second time that the proceedings, having once been scheduled, had to be postponed.

After both district courts and the Court of Military Appeals denied preliminary relief, the court-martial was rescheduled for August 13, 1970. On August 6, however, the instant appeal was docketed, and motions were made for interim relief pending the disposition of the appeal. This Court denied those motions on August 11, 1970. A copy of this Court's order is reproduced, infra at p. 1a. Finally, the Court-martial went ahead as scheduled, and appellant was convicted of unpremeditated murder. He was sentenced to five years confinement, dishonorable discharge, reduction in rank, and forfeiture of pay and allowances. Appellant is presently confined in Danang, Vietnam.[1/]

Appellant's suit in the court below requested an order restraining the holding of the court-martial and requesting his release. The complaint also prayed for a declaratory judgment that he "may not be chargeable with the Capital Crime of Unpremeditated Murder." Complaint, p. 6, ¶4.[2/] Appellant also requested a declaratory judgment "absolving this Plaintiff from any and all wrongdoing," since he allegedly was carrying out the orders of superior officers. Compl., p. 6, ¶6. The complaint also asked that appellant be released from confinement pending adjudication, that he be restored to good standing in

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1/ We state these facts dehors the record, because we shall suggest in part I of our argument that this appeal is moot. In cases of mootness, the intervening facts rendering the action moot may be presented outside the record. See, e.g., Taylor v. McElroy, 360 U.S. 709 (1959). See also Stern & Gressman, Supreme Court Practice §16-2 (3d ed. 1962).

2/ All references are to the original documents which have been included in the appendix which appellant has placed before this Court but which has not been paginated consecutively.

the Marine Corps and that the charges against him be expunged from his service record. Compl., pp. 6-7.

The basis of appellant's complaint is simply stated. He asserts that the murders occurred while he was participating, "without any fault or wrongdoing on his part, under the specific orders and instructions of his superior officers to the best of his information, knowledge, experience, ability, capabilities and training received as a member of the United States Marine Corps." Compl., p. 4, ¶13. See also Compl., p. 5, ¶17. In short, the gravamen of the action is that "no crime has been committed" and that appellant was acting under superior orders. Appellant's Motion for Temporary Restraining Order and Injunctive Relief, filed in this Court on August 6, 1970, p. 5.

In the district court, appellant moved for a preliminary injunction, and appellees moved to dismiss the action. The district court denied the preliminary injunction, and dismissed the action for want of jurisdiction. Subsequently, appellant moved for reconsideration, for designation of a three-judge court, and for a temporary restraining order. These motions were also denied, and appellant took this appeal.

ARGUMENT

I. SINCE THE COURT-MARTIAL HAS ALREADY BEEN HELD, THE ACTION TO ENJOIN IT IS MOOT.

Since the court-martial which appellant seeks to enjoin has already been concluded, this appeal is moot. We have accordingly filed a motion in this Court to dismiss the appeal on the ground of mootness. Appellant was notified of the charges on March 14,

1970, at which time he was represented by counsel. Nearly three months later, as the trial date approached, he began his first of several proceedings for injunctive relief.[3/] In each instance, the military authorities voluntarily continued the proceedings to enable the civilian courts to make their determinations. The judges of four different courts have found his allegations wanting. Appellant had an opportunity in this Court to demonstrate his entitlement to preliminary relief on an emergency basis; he was unable to do so. Only after all these determinations had been made did the court-martial, conducted under difficult combat conditions, proceed with the trial, which resulted in a judgment of conviction.

This Court must view the controversy in the posture in which it now stands, and not as it formerly did. Hall v. Beals, 396 U.S. 45, 48 (1969); Golden v. Zwickler, 394 U.S. 103, 108 (1969); Bynum v. Burns, 379 F. 2d 229 (C.A. 8, 1967); Todd v. Joint Apprenticeship Comm., 332 F. 2d 243 (C.A. 7, 1964), cert. denied, 380 U.S. 914 (1965). Clearly, the Court cannot enjoin the court-martial which has lawfully been held and concluded.

This does not leave appellant without appropriate remedies. He still possesses appellate remedies within the military justice system, and if they prove unavailing, appellant may seek review of his conviction by habeas corpus. The existence of these remedies is the complete answer to appellant's contention that he is

3/ Appellant's delay, in our view, would also justify the denial of injunctive relief on the ground of laches. Even if civilian courts could enjoin courts-martial (as to which see pp. 6-9 infra), concern for the orderly administration of military justice would require that any such suit be filed immediately and not on the eve of trial.

entitled to a declaratory judgment that he is not guilty of the crime with which he was charged. The court-martial has already reached the opposite concludion. The suggestion that this Court may now proceed to expunge the conviction or otherwise absolve him of wrongdoing is, as we demonstrate more fully in our discusion infra, plainly premature.

II. THE CIVIL COURTS DO NOT POSSESS JURISDICTION TO ENJOIN COURT-MARTIAL PROCEEDINGS OR TO ENTER DECLARATORY JUDGMENTS ABSOLVING DEFENDANTS IN THOSE PROCEEDINGS FROM MILITARY CRIMES WITH WHICH THEY ARE CHARGED UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

It should be emphasized that appellant has alleged no deprivation of any constitutional right in this proceeding. In fact, this was as much as admitted in appellant's other suit for injunctive relief in the Northern District of Ohio. As we have indicated, a temporary restraining order was denied by that court on July 22, 1970; no further proceedings have transpired in that case. In the course of its oral opinion, pp. 7a-22a infra, the Ohio district court took cognizance of the pendency of the instant case and noted appellant's apparent attempt to distinguish the District of Columbia suit on the ground that "he did not assert a constitutional basis for the declaratory action in Washington" (p. 10a , infra).

Appellant's sole claim is that because he was participating in a military mission and acting under the orders of his superiors he may not be charged with the murder of civilians. Similarly, the only irreparable injury that is even remotely suggested by appellant's complaint is the inconvenience and

stigma of having to stand trial. Since the trial has already been concluded, even that hardship, which of course is common to all criminal trials, has already been suffered. There is, furthermore, no allegation that the military courts are incompetent, unwilling or unable to judge appellant's case fairly or to adjudicate the validity of any defenses he may have to the charges.[4/] What the appellant asks is that this Court, rather than the court-martial, hear his defenses and absolve him of the charges.

There is no jurisdiction in this Court to do so. In Levy v. Corcoran, 389 F. 2d 929 (C.A.D.C., 1967), cert. denied, 389 U.S. 960 (1967), this Court refused to entertain a suit to enjoin a court-martial, even where the claim was the chilling effect of the military proceedings on the exercise of free speech. It was held that the soldier's defenses were to be raised before the court-martial and then before the Court of Military Appeals.

4/ In his brief, although not in his complaint, appellant states that "the appellees" (he does not specify which of them) are "accessories" and suggests that they are "deprived of jurisdiction" over him (Brief, p. 13). Although the obliqueness of this language renders its meaning unclear, we think the ambiguity is quite immaterial. If this conclusory allegation simply means that appellant was acting under the orders of his superiors, that defense can be adjudicated by the military courts. If it means that the convening authorities were biased against appellant, or have somehow misused their authority, the Court of Military Appeals has formulated elaborate rules for the disqualification of biased convening authorities and the excision of command influence from the proceedings. On the defense of superior orders, see United States v. Keenan, 18 U.S.C.M.A. 108, 39 C.M.R. 108 (1969); United States v. Miles, 11 U.S.C.M.A. 622, 29 C.M.R. 438 (1960). On convening authorities, see United States v. Haygood, 12 U.S.C.M.A. 481, 31 C.M.R. 67 (1961); United States v. LaGrange, 1 U.S.C.M.A. 342, 3 C.M.R. 76 (1952). On command influence, see 10 U.S.C. §837; Green v. Convening Authority, 19 U.S.C.M.A. 576, 42 C.M.R. 178 (1970), infra at pp. 2a-6a ; and p. 9 infra.

Here the prosecution is not for speech but for murder. There is not even a colorable constitutional contention. In his complaint, the appellant requests a "full and complete hearing" in the district court. Compl., p. 6, ¶2. But, in view of the allegations of his complaint, the only issue at such a hearing could be his guilt or innocence -- an issue that is clearly committed to the court-martial for decision. This, then, is an even stronger case for the application of the principles enunciated in Levy.

That military prisoners may not resort to the civilian courts until all available military remedies have been invoked is well-settled. See Gusik v. Schneider, 340 U.S. 128 (1950). That principle has recently been reaffirmed by the Supreme Court. In Noyd v. Bond, 395 U.S. 683, 694 (1969), the Court pointed to the specialized context of military law as a primary reason for deference to military tribunals. Noyd had requested release from confinement pending the outcome of his military appeal. Noting the jurisdiction of the Court of Military Appeals to grant such relief, the Supreme Court held that it would not adjudicate the merits of the soldier's claim "when the highest military court stands ready to consider petitioner's argument." Id. at 696.

In a recent case allegedly arising out of the My Lai incident of March, 1968, a three-judge district court in Georgia has declined to entertain a request for injunctive relief. Torres v. Connor, Civ. Actions No. 13, 895, 13,940 (N.D. Ga., Aug. 10, 1970), reproduced infra at pp. 23a-29a. Unlike the instant case, Torres was a broad attack on the constitutionality of the entire

court-martial system as well as a challenge to alleged constitutional infirmities anticipated in the impending military proceedings (see infra, p. 26a). The court found the challenges premature, stressing the availability of adequate remedies in the military justice system. The complaint was therefore dismissed for failure to exhaust military remedies. No appeal was taken.

The conclusion that appellant's military remedies via trial and appeal are entirely adequate is reinforced by recent developments in military law and practice. In 1968, Congress amended the Uniform Code of Military Justice to strengthen the independence of military judges. See Uniform Code of Military Justice, Art. 37, as amended, 10 U.S.C. §837. See also S. Rept. No. 1601, 90th Cong., 2d Sess. (1968), in 1968 U.S. Code Cong. & Admin. News 4501, 4502-04. In a recent line of cases, the Court of Military Appeals has also held that is possesses wide supervisory jurisdiction over court-martial proceedings, comparable to that of a supreme civilian court. See United States v. Bevilacqua, 10 U.S.C.M.A. 10, 39 C.M.R. 10 (1968), and cases cited therein. See also United States v. Augenblick, 393 U.S. 348, 350 (1969). There can be no contention that Green's defenses will not receive an adequate hearing in the military judicial system.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY
United States Attorney,

ROBERT V. ZENER,
DONALD L. HOROWITZ,
Attorneys.

November, 1970

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,513

September Term, 1969

Civil Action 1700-70

PFC Samuel G. Green, Jr., Appellant

v.

Melvin Laird,
Secretary of Defense, et al.

Before: Wright, Robinson, and Robb,
Circuit Judges, in Chambers

O R D E R

On consideration of appellant's motion for temporary restraining order and injunctive relief and for immediate hearing and of appellees' response thereto, it is

ORDERED that the aforesaid motion is denied.

Per Curiam

nary *voir dire* at trial cannot insure selection of court members who will determine the accused's innocence or guilt free from the influence of any pretrial publicity. See United States v Calley, 19 USCMA 96, 41 CMR 96 (1969). Nor does it reasonably appear from the averments in the pleadings that the other grounds of asserted invalidity in the processes of selection and appointment of members to the court-martial will compel the accused to be tried by court members empaneled by unconstitutional means. See United States v Crawford, 15 USCMA 31, 35 CMR 3 (1964), motion for leave to file petition for writ of certiorari denied, 380 US 970, 14 L Ed 2d 281, 85 S Ct 1349 (1965); United States v Pearson, 15 USCMA 63, 35 CMR 35 (1964).

Headnote 3

So far as the petitioner's complaints as to threatened denial of opportunity to prepare adequately for trial are concerned, these are properly the subject of application to the military judge. On the averments of the Complaint, it would appear that the petitioner should have access in advance of trial to pretrial statements and previous testimony by probable Government witnesses. See United States v Heinel, 9 USCMA 259, 26 CMR 39 (1958). The pleadings, however, do not indicate that recourse to the ordinary and usual procedures will not assure the petitioner full protection of his right to prepare for trial. All the matters complained of in the Complaint and in the Amendment thereto can be raised by appropriate motion or objection at the trial or before an authority having jurisdiction to act in advance of trial. We would not be justified to conclude from the matters before us that the petitioner's request for relief would not receive the full and impartial consideration on the merits to which he is entitled. See Fleiner v Koch, 19 USCMA — (1969); cf. Priest v Koch, 19 USCMA 293, 41 CMR 293 (1970).

Headnote 4

Various allegations as to the alleged inadmissibility of evidence expected to be offered against the petitioner at trial are properly the subject of objection at trial, not the occasion for extraordinary relief by this Court. See Hallinan v Commanding Officer Captain R. S. Lamont, 18 USCMA 652, 653 (1968).

Since no basis for an issuance of a Writ of Prohibition or other order for extraordinary relief appears from the pleadings, the application for relief specified in the Complaint for Writ of Prohibition and the Amendment thereto is denied, and the stay of proceedings heretofore entered is vacated.

Judge Darden would dismiss the Complaint for the reasons stated in his separate opinion in Collier v United States, 19 USCMA 511, 42 CMR 113 (1970).

SAMUEL G. GREEN, JR., Private First Class,
U. S. Marine Corps, Petitioner

v

CONVENING AUTHORITY, Major General Widdecke,
U. S. Marine Corps, Commanding, 1st Marine
Division, Da Nang, Republic of
Vietnam, Respondent

19 USCMA 576, 42 CMR 178

Courts-martial § 4; Review § 21 — convening authority — grant of immunity to prosecution witness.

1. While a grant of immunity to a prosecution witness disqualifies the convening authority as the reviewer of the trial proceedings, it does not prevent him from referring the case to trial.

Witnesses § 107 — pretrial assertion of inconsistent statements.

2. A pretrial allegation that a principal prosecution witness had been induced to change his original description of the incident giving rise to the charges by a promise of immunity would not justify issuance of a writ of prohibition to terminate the proceedings. The grant of immunity would not prevent reference of a case to trial and the effect of a prior inconsistent statement upon the credibility of the witness is a question for resolution by the trier of fact.

Charges and specifications § 41 — investigating officer's recommendation that charge be reduced as not binding.

3. The fact that the investigating officer had recommended a premeditated murder charge be reduced to voluntary manslaughter could not preclude the convening authority from referring a charge of unpremeditated murder to trial, as recommended by the staff judge advocate. Since Article 32 provides only for a "recommendation", finality does not attach to the investigating officer's conclusion that voluntary manslaughter should more appropriately be charged. The determination of the charge or charges to be referred to trial is entrusted to the convening authority, acting after receiving the advice of his staff judge advocate.

Homicide § 29 — unpremeditated murder as offense under Code.

4. Article 118 of the Code provides for the crime of unpremeditated murder.

Courts-martial § 37 — jurisdiction — construction of provisions of Fifth Amendment.

5. As used in the provisions to the Fifth Amendment to the Constitution of the United States requiring a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, "when in actual service in time of war or public danger", the quoted phrase applies only to the militia and would not apply to the trial of a member of the Marine Corps.

Courts-martial § 7 — method of selecting court members as insufficient to raise issue of command control.

6. A justiciable issue of command control cannot be raised by generalized allegations that the accused cannot receive a fair trial because the convening authority, who has already determined the accused should be tried, also determines the membership of the court-martial which will make the findings and impose the sentence and these members are subject to the convening authority's orders and discipline and rely upon him for their promotions.

Miscellaneous Docket

No. 70–50

July 23, 1970

On petition for Writ of Prohibition. Petition denied.

James A. Chiara, Esquire, Alfred V. Boerner, Jr., Esquire, Ben Paul Noble, Esquire, and *Thomas O. Mann, Esquire,* counsel for Petitioner.

Memorandum Opinion of the Court

A charge, alleging three specifications of premeditated murder of several Vietnamese civilians, was originally preferred against the petitioner herein. Upon the advice of his staff judge advocate, the respondent convening authority, Commanding General, 1st Marine Division, reduced the charge to unpremeditated murder, and referred it to trial by a general court-martial which he appointed pursuant to Article 22(a)(3), Uniform Code of Military Justice, 10 USC § 822(a)(3).

By this Petition for Writ of Prohibition petitioner seeks, inter alia, to terminate the proceedings of the general court-martial.

In support of this petition, several averments are advanced. Several relate to the investigation conducted pursuant to Article 32 of the Code, supra, 10 USC § 832. These include:

I. A principal prosecution witness, Lance Corporal Kritchen, was induced to change his original description of the incident giving rise to the charge by a promise of immunity, Article 37 of the Code, supra, 10 USC § 837.[1] While such a grant of immunity disqualifies the convening authority as the reviewer of the trial proceedings, it does not prevent him from referring the case to trial. United States v White, 10 USCMA 63, 27 CMR 137 (1958); United States v Moffett, 10 USCMA 169, 27 CMR 243 (1959). The effect of a prior inconsistent statement upon the credibility of the witness is a question for resolution by the triers of fact. United States v Freeman, 4 USCMA 76, 15 CMR 76 (1954). Since no facts are alleged with reference to the terms of the grant of immunity, such cases as United States v Scoles, 14 USCMA 14, 33 CMR 226 (1963), and United States v Stoltz, 14 USCMA 461, 34 CMR 241 (1964), are not material to our consideration of the instant petition.

Headnote 1
Headnote 2

II. There is no basis in fact or law for referral of the present charge to trial. In support of this allegation, it is argued that the investigating officer recommended reduction of the original charge to voluntary manslaughter, and thus, inferentially, the convening authority could not refer a more serious offense to trial. This is not the law. Article 32, supra, provides:

Headnote 3

"... This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."

Since only a "recommendation" is provided for, finality does not attach to the investigating officer's conclusion that voluntary manslaughter should more appropriately be charged. The determination of the charge or charges to be referred to trial is entrusted by the Code to the convening authority, acting after receiving the advice of his staff judge advocate. Article 34, Code, supra, 10 USC § 834.

Under this heading petitioner also

[1] 10 USC § 837. "Art. 37. Unlawfully influencing action of court. (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts."

declares that the Uniform Code makes no provision for the crime of unpremeditated murder. This is dispelled by the language of Article 118, Code, supra, 10 USC § 918.

Headnote 4

The balance of contentions urged under this heading may more appropriately be determined in the trial forum. It is sufficient to note that none provide a basis for the extraordinary relief contemplated by 28 USC § 1651 (a).

III. It is next argued that, since there is no state of declared war, nor any public danger within the continental limits of the United States or its territories and possessions, the Fifth Amendment to the Constitution of the United States prohibits trial of the charge against the petitioner. This Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, *when in actual service in time of War or public danger*. . . ." [Emphasis supplied.]

The emphasized portion is relied upon as the basis of petitioner's claim. However, that phrase applies only to the militia, and not to members of the land or naval forces. Johnson v Sayre, 158 US 109, 39 L Ed 914, 15 S Ct 773 (1895); Ex parte Mason, 15 Otto 700 (U. S. 1882). As a member of the United States Marine Corps, petitioner is manifestly not a member of the militia, so this portion of the Amendment is inapplicable.

Headnote 5

IV. The circumstances of selection and composition of the members of the general court-martial "of necessity," it is contended, deprive petitioner of disinterested and impartial triers of fact, and thus of due process of law. In this particular, it is urged, the respondent convening authority, who has already determined that petitioner should be tried upon a charge of unpremeditated murder, also determines the membership of the court-martial which will make the findings and impose the sentence. These members are subject to the convening authority's orders and discipline, and rely upon him for their promotions. Thus, they cannot be impartial.

While volumes could be written on the subject of command control—the genesis of this contention—for present purposes it is sufficient to observe simply that, absent a showing of any specific basis for the allegation, the generalized form of contention is inadequate. Congress was fully aware of the possibilities for abuse arising out of the relationship. Indeed, this aspect of military trials consumed a large portion of its deliberations on the Uniform Code of Military Justice. It continued the provisions relating to appointment of court members and provided safeguards it considered adequate to prevent the abuses of command control. Moreover, this is a matter of deep and continuing concern to the Congress. See, Congressional Record of July 1, 1970, page S-10438. Our experience during the intervening years has established the basic soundness of this Congressional determination. See Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury, 1960. As a review of our decisions will show, generalized, unsupported claims of "command control" will not suffice to create a justiciable issue.

Headnote 6

V. A final claim relates to the sentence which might legally be imposed. The arguments urged upon us in support thereof, relate generally to the appropriateness of the sentence—not yet imposed—and are predicated largely upon petitioner's view of the circumstances giving rise to the charge.

No sufficient ground appearing, the petition is denied, without prejudice to raise the issues herein presented at each stage of the proceedings below.

Judge Darden agrees with conclusions reached with respect to the merits of the petitioner's contentions. However, he would dismiss the petition for he believes there is no necessity for reaching the merits since nothing sought therein is in aid of the Court's jurisdiction. See his separate opinion in Collier v United States, 19 USCMA 511, 42 CMR 113 (1970).

UNITED STATES, Appellee

v

SIMON L. COLLIER, Lance Corporal,
U. S. Marine Corps, Appellant

19 USCMA 580, 42 CMR 182

Review § 25 — staff judge advocate's review — omission of testimony relative to key issue.

The staff judge advocate's review was prejudicially inadequate where he advised the convening authority that the key issue in the case was the credibility of the principal prosecution witness, but he failed to mention the testimony of the legal officer at the camp where the case was tried to the effect that he would not believe the prosecution witness under any circumstances while, on the other hand, he believed the accused to be truthful and a credit to the Marine Corps.

No. 23,011

July 24, 1970

On petition of the accused below. NCM 69–4142, not reported below. Reversed.

Lieutenant Scott M. Feldman, JAGC, USNR, was on the pleadings for Appellant, Accused.

Lieutenant Colonel Charles J. Keever, USMC, was on the pleadings for Appellee, United States.

Opinion of the Court

PER CURIAM:

The accused was convicted of one specification alleging the wrongful sale of a habit-forming drug, heroin, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances for eight years, confinement at hard labor for eight years, and reduction to the grade of E–1. The convening authority approved the sentence as adjudged, except for that portion relating to forfeitures and confinement which he reduced to two years. A United States Navy Court of Military Review, with one member dissenting, affirmed the findings and sentence as reduced.

We granted review to consider an allegation that the post-trial review of the staff judge advocate was incomplete and inadequate.

The principal witness for the Government was one Arfa, a former Marine who had been administratively discharged because of possession and use of marihuana. While awaiting a general court-martial for possession of marihuana, he volunteered his assistance to agents of the Office of Naval

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

SAMUEL G. GREEN, JR., etc., Plaintiff, vs. LEONARD CHAPMAN, JR., etc., et al., Defendants.	)	Civil Action No. C 70-695

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OPINION OF THE COURT, RENDERED BY THE HON. WILLIAM K. THOMAS, JUDGE OF SAID COURT, ON WEDNESDAY, JULY 22, 1970.

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APPEARANCES:

On behalf of the Plaintiff:

James A. Chiara, Esq.

On behalf of the Defendants:

Robert B. Krupansky, United States Attorney, and
Edward F. Marek, Assistant United States Attorney.

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OPINION OF THE COURT

THE COURT: Samuel G. Green, Jr., Private First Class of the United States Marine Corps, through his attorney, seeks to enjoin a general court-martial that has been convened to hear charges of unpremeditated murder against Private Green. According to the complaint, the charges grow out of an incident in My Lai, Republic of South Vietnam. Private Green brings his action against Leonard Chapman, Jr., Lieutenant General, Commandant of the United States Marine Corps, and Major General Widdecke, who commands the First Marine Division in South Vietnam and is the convening authority of the general court-martial.

Private Green filed his action in this court yesterday, after notice to the office of the United States District Attorney. Oral argument has been heard this morning on the plaintiff's request for a temporary restraining order. Since the matter has had a full hearing this morning, request for a temporary restraining order will be treated as a request for a preliminary injunction.

To grant a preliminary injunction, there must be a clear showing of immediate and irreparable

injury. It must be shown, too, that it is likely that the applicant is entitled to, or will ultimately be granted, the final relief prayed for. See Cyclopedia of Federal Procedure, "Injunctions," 73.53, page 282.

It is difficult to briefly summarize the 15-page complaint that has been filed by Private Green's counsel. Plaintiff seeks to enjoin his prosecution by the defendants upon the charge of unpremeditated murder and for any other offenses. He states that the prosecution would be repugnant to the Constitution and violative of his constitutional rights. He asks that a district court of three judges be impaneled according to law to hear his application and that the three-judge court grant a permanent injunction from the plaintiff's prosecution by a general court-martial. In the alternative he asks that the district court of three judges order the charges transferred to this court for trial by jury.

As the first ground in opposing plaintiff's application, the United States Attorney notes that plaintiff, through his counsel, filed a similar action seeking similar relief in the United States District Court for the District of Columbia. In that case, on July 9, 1970, Judge John Lewis Smith

of that court denied plaintiff's application for relief and dismissed his complaint. Plaintiff's counsel, while conceding that the Washington suit involves the same subject matter, seeks to distinguish it. He states that that action was a declaratory action. This action seeks an injunction. He observes that the present action claims repugnance to the United States Constitution. He implies that he did not assert a constitutional basis for the declaratory action in Washington.

The United States Attorney, in effect, asks dismissal of this action because the plaintiff should not be permitted to engage in forum shopping. Unsuccessful in his efforts to secure relief in the United States District Court for the District of Columbia, it is urged that plaintiff should not be permitted to file a similar action in this court.

The United States Attorney cites the case of Eastern States Petroleum & Chemical Corporation v. Walker, 177 F. Supp. 328, 333 and 334. There the pendency of the concurrent action in the District of Columbia District Court, which involved the same controversy, was held by the United States District Court for the Southern District of Texas as a sufficient ground for dismissal of the Texas case.

Plaintiff's counsel insists that the policy against forum shopping does not apply in this case. He urges that the form and basis of the present injunctive action seeking the convening of a three-judge court pursuant to 28 U.S.C. Section 2282 distinguishes this case from the suit dismissed by Judge Smith.

However, it is clear that a plaintiff must plead his entire case on all theories at one time. See Premier Electrical Construction Company v. Miller Davis Company, 292 F. Supp. 213 (United States District Court, Northern District of Illinois, Eastern Division, 1968). The subject matter being the same, the plaintiff could have requested the convening of a three-judge court in the suit filed in the District of Columbia. Indeed he could have done it in a declaratory action, which includes injunctive relief among the possible forms of relief that are available in a declaratory suit.

Before the commencement of this afternoon's hearing, counsel for the plaintiff informed the Court that in a rehearing held today before Judge Smith he overruled the motion for reconsideration and reaffirmed his denial of the requested temporary restraining order. This does not alter the aptness

of the rule against forum shopping. Plaintiff may now appeal the decision of Judge Smith. May I also add at this point that I would assume that plaintiff, under Rule 15, would have the right to request an amended complaint setting forth the grounds that you say are present in this case that are not present in the complaint that you filed there.

The ruling, I suppose, might stop at that point; but since other points have been raised here, I think it well for me to indicate my conclusions with reference to these other points.

A point is raised that there is a duty to exhaust remedies in the military justice system before resorting to a district court, or a federal court, for possible relief against the alleged constitutional denials that are set forth in this complaint. And I think that we need not rely solely on Levy v. Corcoran, which has been discussed here, 389 F. 2d 929, at 931, because that case in itself goes back to a United States Supreme Court case that remains the law of the country, Gusik v. Schilder, 340 U.S. 128, in which Justice Douglas in a case involving murder growing out of World War II, without going into the facts of it, held that as long as there was still a remedy within the

military court system of justice there could be no resort to the district court or to the federal courts in that case for habeas corpus relief. But the principle, I think, applies here as well. And that Gusik case has not very long ago been impliedly affirmed by the United States Supreme Court in the case of Noyd v. Bond, 395 U.S. 683, a 1969 decision, just a little over a year ago, in which the Court relied on Gusik among other grounds for its decision in that case.

And may I just point out that among the constitutional grounds that are asserted here, it is contended that there is no declared war in Vietnam, and surely several of the grounds set forth in this complaint are based on that contention. It is interesting to note that quite recently the United States Court of Military Appeals, in a case involving a civilian, was faced with the question of whether that civilian could be tried under the Code of Military Justice, noting that in the jurisdictional section with reference to one not part of the military who was in some way associated with the military -- in this case, a member of the Merchant Marine -- that it only was possible in a situation in which there was a state of war. And

it ruled in this case, which appears in 38 Law Week at 2534, as summed up in the headnote, as follows:

"Article 2 (10) of Uniform Code of Military Justice, which subjects to military jurisdiction persons serving with or accompanying an armed force in the field in time of war, applies only to wars formally declared by Congress."

So that here we have a three-civilian court of military appeals which is certainly giving recognition to the very constitutional point that you are raising here. So I don't think it can be contended that you are not going to be able eventually to raise and test out the constitutional questions that you are asserting here.

And so, under this second point, namely, that you do have a duty to exhaust your remedies within the military justice system, and concluding on that point that you have not done so, I would for that reason also deny your request for either temporary restraining order or for a preliminary injunction, whichever you may call it.

The two cases that have been brought to my attention just before we started the afternoon session, I think, are exceedingly important cases for that proposition. In each of these cases there

had been a complete exhausting of remedies within the military justice system, and in each instance the member of the armed forces had been convicted by the general court-martial, in one case on a charge of unpremeditated murder, which is exactly the charge here, and that the approach taken in each of these cases is still the law under Gusik, namely, you do have a right by habeas corpus to challenge any conviction that may come out of this general court-martial that has now been convened in Vietnam to try Private Samuel Green.

Though I certainly can understand and appreciate the hope that somehow there could be a quicker way, a shortcut, to raise these issues, I can't shut my eyes to the fact that we must also uphold these two parallel systems of justice that we have set up -- by law, because the Code of Military Justice is established by act of Congress, and certainly is not to be ignored by this Court.

The other question that I want to touch on is the one involving the three-judge court, which, as you have indicated, Mr. Chiara, apparently was not in your complaint in Washington, if I understand what you are saying. And you have brought to the Court's attention a case filed in the Northern

District of Georgia District Court, known as Torres, Sergeant United States Army v. Albert O'Connor, Lieutenant General of the United States Army, Commanding General Third United States Army; and you call to the Court's attention that a three-judge court has been convened in that case and you cite that as precedent.

And you also bring to the Court's attention a Fifth Circuit decision, Jackson v. Choate, 404 F. 2d 910, a 1968 decision, in which the Chief Judge John R. Brown rules that a three-judge court should have been convened, in effect that it didn't take a mandamus action to get that. When I called at noontime the U.S. District Court for the Northern District of Georgia, I found that the case that you brought my attention to is presently pending before a three-judge court, as you have indicated. It was filed in that court and assigned to Judge Henderson. However, Judge Henderson was not available, and so another judge of that court out of hand, ex parte, granted the temporary restraining order without hearing it. And then, as explained to me on the telephone in a soft southern accent, it is the practice in the Fifth Circuit, under Chief Judge Brown's order, that if a three-judge court is

requested, automatically a three-judge court is granted without a prior hearing.

And that is exactly the point that is brought out in this Jackson case, which is an opinion of Chief Judge Brown. And then Judge Brown says it is for that three-judge court to decide whether or not a three-judge court should have been convened. And so I would have to say that I don't believe that the Fifth Circuit decisions are necessarily precedents. It is, to my knowledge, not the policy of the Sixth Circuit to do it in that fashion. And I would have to say that since the decision of Rosado v. Wyman, decided by the United States Supreme Court on April the 6th, 1970, that I doubt that the Fifth Circuit policy should generally, or will generally, be followed in this circuit. In this decision Justice Harlan, early in the decision, made this comment, and this appears on page 4 of the slip sheet. This is found at 38 Law Week 4266, and his comment is as follows:

"While Congress has determined that certain classes of cases shall be heard in the first instance by a district court composed of three judges, that does not mean that the court qua court" -- which I guess is Latin for "as" -- "loses all jurisdiction

over the complaint that is initially lodged with it. To the contrary, once petitioners file their complaint, alleging the unconstitutionality of Section 31-8" -- and I say parenthetically that was a law of New York State dealing with welfare grants -- "the district court, sitting as a one-man tribunal, was properly seized of jurisdiction over the case under Section 1343(3)(4) of Title 28 and could dispose of even the constitutional question either by dismissing the complaint for want of a substantial federal question, Ex Parte Poresky, 290 U.S. 30 (1933), or by granting requested injunctive relief if 'prior decisions (made) frivolous any claim (the) state statute on its face (was) not unconstitutional.'"

So I take it, as I read this case, if I decide that there is not a substantial constitutional question presented on the face of the record here, then I do have jurisdiction to rule on that question and need not request the chief judge of the circuit to convene a three-judge court. But, in any event, that is my view of it and if I am wrong on it the Sixth Circuit can quickly instruct me to convene a three-judge court. And this matter can be quickly, I think, taken up by you, Mr. Chiara, with Judge

Celebrezze right here in this courthouse, if you choose, or with Chief Judge Phillips, on that point of law.

This brings us then to whether or not there is a substantial constitutional question presented here. As I read the complaint, it is not contended that, at least I don't understand that a reasonable construction of that complaint could possibly charge that, the Uniform Military Justice Code is unconstitutional on its face. If anything, the charge is that, as is being applied in this case, it has certain unconstitutional effect on Private Samuel Green. And there are several things mentioned, including the person who has now been, you say in the complaint, persuaded to testify against Private Green, and that this in some way violates Article 39 of the Military Code of Justice.

I think this becomes a question of whether there is an unconstitutional application of the Justice Code to Private Green, and not whether or not on its face the Code is unconstitutional. And this, of course, would mean that you would have to take all of the evidence in the matter, in effect conduct a trial, to determine whether or not the application of the Code to Private Green violates

his constitutional rights as contended in the complaint. I don't think that this is a function of this Court in this proceeding, because you can certainly make your record in the general court-martial and eventually raise each one of the constitutional questions by habeas corpus otherwise, in the event of an adverse ruling against Private Green.

Accordingly, I do not find that there is a substantial constitutional question here that would require this Court to request the convening of a three-judge court under 28 U.S.C. Section 2282. And further, and finally, I do not find that the test necessary to grant a preliminary injunction is present, namely, on this record, upon the argument presented, upon the complaint that I have examined, and upon the law which I deem applicable, I do not find that it is likely that Private Samuel Green, Jr., would ultimately prevail if the case were heard on a request for permanent injunction relief.

And, accordingly, I respectfully must overrule your request for a temporary restraining order. Exceptions noted to the plaintiff.

MR. CHIARA: May I address the Court?

THE COURT: Certainly.

MR. CHIARA: If your Honor please, for

the purpose of the record, at the beginning of your statement I think you referred to the My Lai incident. This was not the My Lai incident; this was Que Son.

THE COURT: I thought I read "My Lai" right in your complaint.

MR. CHIARA: No, we refer to the My Lai incident, but this was not part of it.

THE COURT: In other words, the second ground, which says, "On December 8th, 1969, shortly after the public disclosure of an incident in My Lai, the President," etc., that is merely by reference; is that right?

MR. CHIARA: That's right, sir.

THE COURT: Very well. I stand corrected on that. I don't think that changes the principle of law involved.

MR. CHIARA: I don't think so, but --

THE COURT: I am glad to be corrected.

MR. CHIARA: -- keep the record straight.

THE COURT: I am very glad to be corrected on the fact situation.

Anything further that you would like to put on the record at this time?

MR. CHIARA: Off the record, I'm tired.

THE COURT: Anything you would like to put on, Mr, Krupansky?

MR. KRUPANSKY: Nothing, your Honor.

THE COURT: Very well. You may close court, Mr. Johnson.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ESEQUIEL TORRES, SERGEANT, U. S. ARMY	:	
VERSUS	:	CIVIL ACTION NO. 13,895
ALBERT O. CONNOR, LT. GENERAL, U. S. ARMY, AS COMMANDING GENERAL, THIRD UNITED STATES ARMY	:	
ROBERT W. T'SOUVAS, SPECIALIST FOUR, U.S. ARMY	:	
VERSUS	:	CIVIL ACTION NO. 13,940
ALBERT O. CONNOR, LT. GENERAL, U. S. ARMY, AS COMMANDING GENERAL, THIRD UNITED STATES ARMY	:	

Before: BELL, Circuit Judge, SMITH and HENDERSON, District Judges

HENDERSON, District Judge:

Esequiel Torres and Robert W. T'Souvas, members of the U. S. Army, filed separate actions in this court to enjoin the defendant from subjecting them to trial by general court martial. Each has been charged with violations of the Uniform Code of Military Justice (U.C.M.J.); specifically murder, in violation of Article 118, and, in the case of Torres, also assault with the intent to murder, in violation of Article 134. These crimes allegedly arose in connection with the My Lai incident of March, 1968. Both plaintiffs claim that to subject them to court martial would violate fundamental constitutional rights and cause them irreparable damage for which no adequate remedy exists at law.

Federal question jurisdiction exists under 28 U.S.C. §1331 since the amount in controversy is alleged in excess of $10,000 and the actions arise under the Constitution and laws of the United States.

Torres, on June 24, 1970, requested that a three-judge court be convened pursuant to 28 U.S.C. §2282, and that defendant be temporarily restrained from trying him, pending that hearing. A temporary restraining order issued, and on July 2, 1970, a preliminary injunction was entered prohibiting defendant from placing Torres on trial until further order.

T'Souvas filed a virtually identical complaint against defendant on July 13, 1970. In view of the similarities, these cases were consolidated for purposes of argument before a three-judge district court on July 15, 1970. At the hearing, following argument, the preliminary injunction in the Torres case was dissolved; however, the Army, acting upon the court's request, agreed to stay all proceedings against plaintiffs for at least 21 days to allow submission by plaintiffs of briefs and proffers of evidence, and decision by this court.

Torres alleges fifteen grounds in support of his application for injunctive relief. T'Souvas repeats these and asserts two additional grounds. Essentially, plaintiffs claim a court martial would violate rights guaranteed them by the Fifth, Sixth and Eighth Amendments of the Constitution, and also would be in violation of Article III, Sections 1 and 2. Plaintiffs' constitutional attack is based upon alleged deficiencies common to all military tribunals, the illegality of the Viet Nam War, and the peculiar facts and circumstances surrounding the My Lai incident.

Plaintiffs attack the failure of the U.C.M.J. to provide for military tribunals comprised of disinterested and impartial triers of fact; to provide for unanimous findings by the triers of fact to obtain a conviction; to provide the form, manner or means of punishment; to provide for the right of an accused to confront witnesses; to provide for speedy trials; and to provide trial by jury. Because of these broad attacks against the U.C.M.J., granting relief on these grounds would necessitate an injunction against the execution of an Act of Congress, the U.C.M.J., for repugnance to the Constitution of the United States. Accordingly, a three-judge court was empaneled to determine whether these cases were properly for a three-judge rather than a single-judge court, pursuant to 28 U.S.C. §§2282, 2284.

At the July 15, 1970, hearing before this court, it was noted that these cases raised three-judge questions, and jurisdiction was assumed under Section 2282. Next, considering the merits of the claims, the court rejected plaintiffs' attacks against the U.C.M.J. The Supreme Court has recognized that trial by a military tribunal deprives one of trial by jury and other constitutional rights, Reid v. Covert, 354 U.S. 1 (1957); however, the Court has not ruled the U.C.M.J. unconstitutional. Rather, the Court has acted, in recent landmark decisions such as O'Callahan v. Parker, 395 U.S. 258 (1969); Reid v. Covert, supra, and Toth v. Quarles, 350 U.S. 11, (1957), to restrict military jurisdiction to the narrowest limits consistent in the power granted Congress in Art. I, Sec. 8, Cl. 14, "To make Rules for the Government and Regulation of the land and naval forces". This court will not hold the U.C.M.J. unconstitutional for deficiencies

which the Supreme Court has long acknowledged in those cases which are properly subject to military jurisdiction. There can be no doubt that plaintiffs are subject to military jurisdiction, as both are members of the armed forces and, clearly, the alleged crimes are service-connected. O'Callahan v. Parker, supra.

We also rejected the contention that the question of the legality of the Viet Nam War provides a basis for intervention by this court into the court martial jurisdiction of the Army under the circumstances alleged. See on the question of the legality of the war: Orlando v. Laird, Civil No. 70C745 (E.D. N.Y. 1970) (the lack of a formal declaration of war by Congress is without legal effect); and see also Simmons v. United States, 406 F.2d 456, 460 (5th Cir. 1969); and Luftig v. McNamara, 373 F.2d 664, 665 (D.C. Cir. 1967).

What remained of plaintiffs' contentions after the July 15th hearing were those grounds alleging that it would be fundamentally unfair, in view of the peculiar facts and circumstances surrounding the My Lai incident, to require plaintiffs to be tried by court martial. Such problems as command influence, pre-trial publicity, denial of effective right of counsel, inability to obtain relief within the military system, and selective prosecution were raised during argument to illustrate the fundamental unfairness of requiring plaintiffs to be subjected to military trial. Following the hearing plaintiffs were afforded ten days within which to proffer evidence establishing the fundamental unfairness which they were prepared to establish by competent evidence. Plaintiffs' proffers were submitted, in camera, on July 27; and, on July 29, by order of this court, the proffers were made public and part of the record. Defendant's response to

the proffers was submitted on July 31.

The defendant filed a motion to dismiss on July 20, 1970, making four contentions. First, it is claimed that a district court has no jurisdiction to enjoin a court martial. Secondly, defendant urges that plaintiffs' allegations fail to state a basis for the exercise of jurisdiction by a three-judge district court. Thirdly, defendant asserts that plaintiffs' failure to exhaust available military remedies means they have not stated a claim for relief. Lastly, defendant argues that plaintiffs' allegations are facially without merit. Because of the conclusion we have reached, it is unnecessary to consider all four of the points raised in defendant's motion.

Upon consideration of the full record in these cases including the memoranda filed, the hearing of July 15, the defendant's motion to dismiss and the proffers of evidence, we hold that plaintiffs have failed to demonstrate such fundamental unfairness as would warrant this court enjoining the court martial. This holding should in no way be read as casting light on the merits of plaintiffs' due process contentions. We have not rejected the claims on command influence, pre-trial publicity, and the other matters proffered; we have merely rejected plaintiffs' argument that it would be fundamentally unfair to require these matters be first raised in the military courts. Our ruling relates to the timing, rather than the merits, of this suit.

In reaching this conclusion, we rely primarily on the belief that plaintiffs have an adequate remedy at law. Congress has established a system of court martial procedure uniformly applicable

to all branches of the armed forces, including final appellate review by the United States Court of Military Appeals, an independent tribunal composed of three civilians appointed by the President. Congress has not given the Supreme Court appellate jurisdiction to supervise the administration of the separate branch of military courts, Noyd v. Bond, 395 U.S. 683, 694 (1969), thus emphasizing the separation between the military courts and the federal courts.

Here there are military proceedings pending against plaintiffs which they seek to enjoin in federal court. This is directly analogous to the situation where an individual against whom state criminal proceedings have been commenced seeks the aid of the federal courts to enjoin further state prosecution. Only within the narrow limits prescribed by Dombrowski v. Pfister, 380 U.S. 479 (1965), where First Amendment rights are involved, will the federal courts enjoin a state prosecution. The reluctance of federal courts to interfere with the operations of a co-ordinate judicial system was aptly stated in City of Greenwood v. Peacock, 384 U.S. 808 at 828 (1968):

> ... the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted ... that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

We perceive no reason why similar deference ought not be accorded the military courts established by Congress under Art. I, Sec. 8, Cl. 14 of the Constitution.

As in In Re Kelly, 401 F.2d 211 (5th Cir. 1968), a case in which it was attempted to enjoin a court martial, we are unwilling to presume that the military courts will not fully and

fairly consider the claims of plaintiffs. We find there is insufficient reason to depart from the well-established policy that once a member of the armed forces commits an offense and the military justice process is initiated, the federal courts will not interfere until that process has been exhausted. Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, supra; Burns v. Wilson, 346 U.S. 137 (1952); Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967); In Re Kelly, supra; Green v. Laird, Civ. No. 1700-70 (D D.C., decided July 9, 1970); and MacDonald v. Flanagan, Civil No. 915 (E.D. N.C., decided July 19, 1970). Plaintiffs' proffers of evidence fail to overcome the strong policy reasons for requiring exhaustion of military remedies in these cases. The traditional manner of seeking relief in the federal courts from constitutionally defective court martial action is by habeas corpus. Should plaintiffs be convicted in the military courts, this course will be available to them.

Accordingly, defendant's motion to dismiss is granted for failure to exhaust military remedies.

IT IS SO ORDERED.

This 10 day of August, 1970.

Griffin B. Bell

GRIFFIN B. BELL
United States Circuit Judge

Sidney O. Smith, Jr.

SIDNEY O. SMITH, JR.
United States District Judge

Albert J. Henderson, Jr.

ALBERT J. HENDERSON, JR.
United States District Judge